Citibank NA v Jong Tze Khiok & Anor

SUPREME COURT (KUCHING) — CIVIL APPEAL NO 02-450-1991
JEMURI SERJAN CJ (BORNEO), EDGAR JOSEPH JR AND MOHAMED DZAIDDIN SCJJ
2 OCTOBER 1993

Land Law *— Charge — Application for sale of charged land — Action under O 83 of the Rules of the High Court 1980 is derived from s 148(2) of the Sarawak Land Code (Cap 81) — Terms of the charge are to be considered — Rules of the High Court 1980 O 83 — Sarawak Land Code (Cap 81) s 148*

Land Law *— Charge — Application for sale of charged land — Requirements for demand and notice of default — Length of notice — Rules of the High Court 1980 O 83 — Sarawak Land Code (Cap 81) s 148*

Land Law *— Charge — Application for sale of charged land — Notice of demand not condition precedent to application under s 148 of the Sarawak Land Code (Cap 81) — Sarawak Land Code (Cap 81) s 148*

Statutory Interpretation *— Aids to construction — Proviso to s 148(3) of the Sarawak Land Code (Cap 81) — Whether proviso should be resorted to in construing main section — Sarawak Land Code (Cap 81) s 148(3)*

Statutory Interpretation *— Aids to construction — Legislative history —Language of section is clear and unambiguous — Whether legislative history should not be used as an aid in construction — Sarawak Land Code (Cap 81) s 148(3)*

Companies and Corporations *— Service of documents — Notice of demand — Service on general manager was sufficient service on company*

The respondents (defendants), the registered proprietors of land in Miri, Sarawak, charged the land as security for banking facilities granted by the appellant (plaintiff) at the request of the respondents to Yong Tze Kiok Co Sdn Bhd ('the customer'), up to a total amount not exceeding B$2m. The customer defaulted and the appellant gave the respondents 14 days' notice in accordance with the terms of the charge. Subsequently, the appellant took out an originating summons for an order for the sale of the land under s 148(2)(c) of the Sarawak Land Code (Cap 81) ('the Code'). At the hearing in the High Court, counsel for the parties agreed to submit only three issues for the determination of the court: (i) that the notice failed to comply with s 148 of the Code; (ii) that there was failure to serve such notice in accordance with s 208 of the Code; and (iii) that such notice was confusing, whether it was meant for the customer or the respondents. The trial judge dismissed the application on the grounds that the appellant had not established that the respondents had defaulted in payment of the amount secured by the charge and that the notice to the defendants was not good on account of non-compliance with the proviso to s 148(3) of the Code. The appellant has appealed.

Held, allowing the appeal:

(1) The trial judge's reasoning was redolent of an action founded on a guarantee which is based on the law of contract, whereas in the present case, an action under O 83 of the Rules of the High Court 1980 ('the RHC') for sale of charged property is derived from the provisions of s 148(2) of the Code. Here, one has to look at the provisions of s 148 of the Code to determine the circumstances under which the appellant's right to apply for the order would arise and, in the process, the terms of the charge have also to be considered. All the authorities on demand or service of demand in an action under a guarantee have no application and are irrelevant to a charge action under O 83 of the RHC in conjunction with s 148 of the Code.

(2) Under s 148(1) of the Code, it is the default and not the demand for payment under the charge that triggers off the right of the chargee to issue the notice in writing. Such notice is not intended for the purpose of demanding payment of the amount due but to notify the chargor that the chargee would resort to s 148(2)(c) for an order of sale of the charged land unless such default is remedied.

(3) The demand under cl 1 of the charge was not a condition precedent to the action under s 148. On the contrary, it was the default on the part of the chargor to make the payment on demand that constituted a condition precedent to an application under s 148(2)(c) of the Code.

(4) The trial judge erred in allowing the proviso to s 148(3) of the Code to play the prominent role in the process of construing s 148(3) and thus control the construction of the main sub-s (3) of s 148 of the Code. The proviso, being intended to operate or have the effect of excepting the main provision only where no period of notice was stipulated in the charge, did not, therefore, apply in the instant case.

(5) As the language of s 148(3) of the Code is clear and unambiguous, there was no reason for the trial judge to resort to the legislative history of that section because to do so would alter completely the intention of the legislature when it introduced the section.

(6) The other two issues were not argued on appeal and neither were they dealt with by the High Court. In fact, the first and second issues seem to be a contradiction in terms and the third issue was answered by the first respondent by his admission that he was the general manager of the customer. Service on the first respondent would, therefore, be sufficient service on the customer.

[Bahasa Malaysia summary

Responden (defendan), iaitu tuan punya berdaftar tanah di Miri, Sarawak, telah menggadai tanah itu sebagai cagaran bagi kemudahan perbankan yang diberi oleh perayu (plaintif) atas permintaan responden kepada Yong Tze Kiok Co Sdn Bhd ('pelanggan itu'), berjumlah tidak lebih daripada B$2 juta. Pelanggan itu telah ingkar membayar

baki hutang itu dan perayu telah memberi notis 14 hari kepada responden itu mengikut syarat-syarat gadaian itu. Kemudiannya, perayu telah mengeluarkan suatu saman pemula untuk mendapat perintah penjualan tanah itu di bawah s 148(2)(c) Kanun Tanah Sarawak (Bab 81) ('Kanun itu'). Pada pendengaran kes itu di Mahkamah Tinggi, peguambela bagi pihak-pihak telah mengemukakan tiga isu untuk keputusan mahkamah: (i) bahawa notis itu tidak mematuhi s 148 Kanun itu; (ii) bahawa penyampaian notis itu tidak mengikut s 208 Kanun itu; (iii) bahawa notis itu mengelirukan, oleh kerana tidak jelas sama ada ia ditujukan kepada pelanggan itu atau responden. Hakim perbicaraan telah menolak permohonan itu atas alasan bahawa perayu telah gagal membuktikan bahawa responden telah ingkar membayar jumlah yang dijamin oleh gadaian itu dan notis kepada defendan adalah tidak sah kerana ketidakpatuhan dengan proviso kepada s 148(3) Kanun itu. Perayu telah membuat rayuan.

Diputuskan, membenarkan rayuan itu:

(1) Keputusan hakim perbicaraan menunjukkan dengan jelas bahawa ia berdasarkan suatu jaminan yang berasaskan undang-undang kontrak, manakala dalam kes ini, suatu tindakan di bawah A 83 Kaedah-Kaedah Mahkamah Tinggi 1980 ('Kaedah itu') untuk penjualan harta yang digadaikan, berasal daripada peruntukan s 148(2) Kanun itu. Di sini, seseorang mesti melihat kepada peruntukan s 148 Kanun itu untuk menentukan keadaan di bawah mana hak perayu untuk memohon perintah itu akan timbul dan, dalam proses itu, syarat-syarat gadaian itu juga mesti dipertimbangkan. Semua autoriti mengenai tuntutan atau penyampaian tuntutan di dalam tindakan di bawah jaminan tidak terpakai dan tak relevan kepada suatu tindakan mengenai gadaian di bawah A 83 Kaedah itu bersama dengan s 148 Kanun itu.

(2) Di bawah s 148(1) Kanun itu, adalah pengingkaran membayar dan bukan tuntutan pembayaran di bawah gadaian itu yang mencetuskan hak pemegang gadaian untuk mengeluarkan notis bertulis. Notis itu bukan dimaksudkan untuk menuntut pembayaran jumlah yang kena dibayar kepada pemegang gadaian tetapi untuk memberitahu penggadai bahawa pemegang gadaian itu akan menggunakan s 148(2)(c) untuk mendapat suatu perintah penjualan tanah itu jika keingkaran itu tidak diremedikan.

(3) Tuntutan di bawah fasal 1 gadaian itu bukanlah suatu syarat terdahulu untuk tindakan di bawah s 148. Sebaliknya, keingkaran penggadai untuk membuat pembayaran apabila dituntut yang menjadi syarat terdahulu kepada permohonan di bawah s 148(2)(c) Kanun itu.

(4) Hakim perbicaraan telah membuat kesilapan apabila membenarkan proviso kepada s 148(3) Kanun itu memainkan peranan penting dalam proses pentafsiran s 148(3) Kanun itu dan dengan demikian mempengaruhi tafsiran bahagian utama sub-s (3) s 148 Kanun itu. Oleh itu, proviso itu, yang bertujuan beroperasi atau

mempunyai kesan mengecualikan peruntukan utama hanya di mana jangkamasa notis tidak ditetapkan di dalam gadaian, tidak terpakai dalam kes ini.

(5) Oleh kerana bahasa yang digunakan dalam s 148(3) Kanun itu jelas dan tidak kabur, tidak ada sebab untuk hakim perbicaraan merujuk kepada sejarah perundangan seksyen itu, kerana jika beliau membuat demikian, ini akan menukarkan sama sekali tujuan badan perundangan apabila ia memperkenalkan seksyen itu.

(6) Dua isu yang lain itu tidak dihujahkan pada masa rayuan dan juga tidak dibincangkan oleh Mahkamah Tinggi. Pada hakikatnya, isu pertama dan kedua nampaknya bertentangan antara satu sama lain dan isu ketiga telah dijawab oleh responden pertama apabila beliau mengaku bahawa beliau adalah pengurus besar pelanggan itu. Oleh itu, penyampaian kepada responden pertama memadai sebagai penyampaian kepada pelanggan itu.]

Notes

For cases on notices of default, see 8 *Mallal's Digest* (4th Ed) paras 1096–1098.

For cases on notices of demand, see 8 *Mallal's Digest* (4th Ed) paras 1099–1110.

For cases on aids to construction, see 11 *Mallal's Digest* (4th Ed) paras 1262–1284.

For cases on service of documents on companies, see 3 *Mallal's Digest* (4th Ed) paras 168–173.

Cases referred to

1 *Orang Kaya Menteri Paduka Wan Ahmad Isa Shukri bin Wan Rashid v Kwong Yik Bank Bhd* [1989] 3 MLJ 155 (distd)

2 *Mok Hin Wah & Ors v United Malayan Banking Corporation Bhd* [1987] 2 MLJ 610 (distd)

3 *The Guardians Of The Poor Of The West Derby Union v The Metropolitan Life Assurance Society & Ors* [1897] AC 647 (folld)

4 *Corporation of the City of Toronto v A-G for Canada* [1946] AC 32 (refd)

5 *Hadmor Productions Ltd & Ors v Hamilton & Anor* [1983] 1 AC 191; [1982] 1 All ER 1042; [1982] 2 WLR 322 (folld)

6 *R v Titterton* [1895] 2 QB 61 (folld)

7 *Beswick v Beswick* [1968] AC 58; [1967] 2 All ER 1197; [1967] 3 WLR 932 (folld)

Legislation referred to

Sarawak Land Code (Cap 81) s 148

Appeal from: Originating Summons No MR62 of 1989 (High Court, Miri)

David CC Lim (*Wan Ullok, Jugah, Chin & Co*) for the appellant.
KY Lin (*Wong, Lin & Co*) for the respondents.

Jemuri Serjan CJ (Borneo) (delivering the grounds of judgment of the court): At the hearing of this appeal on 18 May 1993, we allowed the appeal with costs here and below and ordered the deposit to be refunded to the appellant, and indicated that we would give our reasons later. These are the grounds of our judgment.

In this case, the first and second defendants/respondents ('the defendants'), Jong Tze Khiok @ Yong Tze Kiok @ Jong Tsz Khiok and Yong Ng Fah, the registered proprietors of the land described as Lot 535, Block 9, Miri Concession Land District, charged the said land as security for banking facilities granted by Citibank NA, the plaintiff/appellant ('the plaintiff'), at the request of the defendants, to Yong Tze Kiok Co Sdn Bhd ('the customer'), up to an aggregate total amount not exceeding B$2m only ('the principal sum'). According to the terms of the charge, the defendants promised to pay the principal sum upon, and only upon, demand, and similarly, the balance, which at the date of such demand was still owing to the plaintiff by the customer, together with interest at the rate of 2% above the prime rate, was also to be paid upon, and only upon, demand.

The customer having defaulted, the plaintiff took out an originating summons for an order of sale of the charged land under s 148(2)(c) of the Sarawak Land Code (Cap 81) ('the Code'). In support of the originating summons, the vice-president of the plaintiff, Encik Cheng Hock Kian, by an affidavit affirmed on 12 September 1989, asserted that the appellant advanced, by way of letters of credit, a total sum of B$222,716.53 and granted and/or continued to grant overdraft facilities as well. The principal amount outstanding on the letters of credit as at 28 February 1989 was B$195,596.03 and the amount of interest in arrears was B$30,462.59, making a total outstanding of B$226,058.62 and the amount of interest charged on the said facility per day was B$38.84. The principal amount outstanding in respect of the overdraft facility as at 28 February 1989 was B$2,696,534.29 while the amount of accrued interests on the overdraft facility was B$570,147.83. The total amount of the principal sum with accrued interest outstanding was B$3,492,740.74.

The first defendant, on behalf of himself and the second defendant, filed two affidavits in opposition and raised several issues, some of which were irrelevant. What clearly emerged from his affidavits was the admission by the first defendant that he and the second defendant were shareholders of the customer and that the first defendant was its managing director. At the hearing in the High Court, counsel for the parties, however, agreed to submit for the determination of the court only three issues which they contended to be relevant to the application for the order under s 148(2)(c) of the Code. The three issues were:

(1) that the notice, exh CHK3 failed to comply with s 148 of the Code;
(2) that there was failure to serve such notice in accordance with s 208 of the Code; and
(3) that such notice was confusing, that is to say, whether it was meant for the customer or for the defendants.

Having heard and considered the submissions of counsel for both parties, his Lordship dismissed the application on the grounds that the plaintiff had

not established that the defendants defaulted in payment of the principal sum, interest and other moneys secured by the said charge, and that the notice to the defendants was not a good notice in law on account of non-compliance with the proviso to s 148(3) of the Code. The learned judge found favour with the defendants' contention and so ruled accordingly. The relevant passage of the judgment for the purpose of convenience is hereby reproduced:

> The proviso must be read as fixing a minimum statutory period of 30 days' notice to be given; and if more (but not less) than 30 days' notice is to be given, it must be expressly stipulated as a term of the charge, in which case the notice to be given shall comply with the terms of the charge as provided in s 148(3) of the Code.
>
> As I have said before, it is not possible for the chargee and the chargor to stipulate a period less than the statutory minimum of 30 days for the notice to be given; it follows that insofar as cl 2 of exh CHK1 purports to contract out of the proviso to s 148(3) of the Code, it does not succeed and has no legal force or effect. The legal position then, is as if no period of notice was stipulated in the charge and the statutory minimum of 30 days' notice stipulated by the proviso to s 148(3) sticks. That being the view I take, insofar as para 4 of exh CHK3 gives only 14 days' notice to the chargor, it is 16 days short of the statutory minimum of 30 days and has, therefore, not complied with the proviso to s 148(3) of the Code. In the premises, I hold that the notice in exh CHK3 was not good in law.
>
> Since the plaintiff has not established that the defendants defaulted in payment of the principal sum, interest and other moneys secured by the charge in exh CHK1 and further, that the notice in exh CHK3 given by the plaintiff to the defendants was good in law, I cannot say that I am satisfied in those circumstances that the plaintiff's power of sale arose or became exercisable so as to justify an order of sale to be made of the charged land and consequently, I decline to make such order. For the reasons given, I dismiss the plaintiff's application with costs to the defendants to be taxed.

In the course of the arguments, we were informed that the matter had been amicably settled and that the appeal before us became an academic exercise only. The crucial issue that called for our determination was, on the first issue, whether 14 days' notice as stipulated in the charge was valid in law, having regard to the provisions of s 148.

It was clear from the passage of the judgment on this issue that his Lordship's reasoning was redolent of an action founded on a guarantee, where service or notice of demand was not made in accordance with the terms of the guarantee and highlighted in cases such as *Orang Kaya Menteri Paduka Wan Ahmad Isa Shukri bin Wan Rashid v Kwong Yik Bank Bhd*[1] and *Mok Hin Wah & Ors v United Malayan Banking Corporation Bhd*,[2] where it was held that demand was a condition precedent to a suit to claim money lent. In our view, the analogy drawn from cases based on action under a guarantee was not appropriate. An action under O 83 of the Rules of the High Court 1980 ('the RHC') for sale of charged property is derived from the provisions of s 148(2) of the Code, whereas an action under a guarantee is based on the law of contract and, in the case of the former, one has to look at the provisions of s 148 of the Code to determine the circumstances under which the plaintiff's right to apply for the order would arise and, in the process, the terms of the charge have also to be considered. All the

authorities on demand or service of demand in an action under a guarantee to claim payment of money lent or facilities granted, have no application and are irrelevant, in our view, to a charge action under O 83 of the RHC in conjunction with s 148 of the Code.

The relevant clause in the charge dealing with demand is cl 1 and reads as follows:

> Demands
>
> Any demand for payment of the moneys intended to be hereby secured may be made in writing, requiring payment within seven days from the date of demand and may be signed on behalf of the bank by the manager, assistant manager, sub-manager, accountant or any other officer of the bank or by any advocate or firm of advocates acting for and on behalf of the bank and such notice shall be deemed to have been sufficiently served on the chargor/customer if it is left at or sent by registered mail to the address or addresses of the chargor/customer above-written. If the demand is sent by registered mail, it shall be deemed to have been served at the time when the registered letter would, in the ordinary course of events, be delivered.

Clause 2 which deals with default and statutory notice is hereby reproduced:

> (1) Default and statutory notice
>
> In the event of the chargor failing to make payment upon demand as hereinbefore stated or failing or refusing to observe, perform, carry out or act on any of the terms, covenants, stipulations and conditions on the part of the chargor herein contained or in the event of the chargor committing an act of bankruptcy or if a petition shall be presented or an order made or a resolution passed for winding up the chargor or in the event of the customer failing to operate actively the account for which this charge has been created to the satisfaction of the bank or strictly within the limit of the principal sum, which shall include the computation of interest, then notwithstanding any rule or law to the contrary, it shall only be necessary for the bank to give 14 days' notice in writing to the chargor to entitle the bank to resort to all the bank's rights and remedies under the Code as a result of the breach. Service of such notice shall be effected in the same manner as a notice demanding payment of the balance due as hereinbefore provided.

Having considered the demand clause in the charge, the learned judge came to the following conclusion:

> It is plain from the recital of the consideration quoted that demand is a condition precedent to be fulfilled by the bank before the principal sum or the balance thereof plus interest thereon and other moneys become due and payable. By cl 1 of exh CHK1, such demand had to be in writing, requiring payment within seven days from the date thereof and served on the chargor/customer. If the chargor/customer failed to make payment within the seven-day period pursuant to such notice of demand issued, then only may the bank give 14 days' notice to the chargor to entitle it to resort to all the bank's rights and remedies under the Code as a result of the breach. Quite clearly, the notice of demand issued under cl 1 was an important document that must be exhibited to the plaintiff's affidavits, Nos 1 or 2, which was not so exhibited, and Mr KY Lin quite appropriately drew this point to my attention at the hearing. It is an issue of fact whether such notice of demand was ever issued under cl 1 by the bank to the chargor/customer after

execution by the parties of exh CHK1. That issue is for the plaintiff to establish, which it has not proved. Mr David Lim will no doubt say that para 3 of exh CHK3 expressly stated that repeated demands were made by his client (the bank). I am not satisfied that is proof enough. The point is, assuming that repeated demands were made, were they made under cl 1 of exh CHK1 after execution thereof by the parties? Only the plaintiff can answer that truthfully and no explanation is given for the omission or failure to exhibit it in any of the plaintiff's affidavits filed. The notice of demand under cl 1 is important because only upon its issuance to and service on the chargor/customer, the principal sum or its balance plus interest thereon and other moneys secured by exh CHK1 become due and payable and, if it is not paid to the bank after the seventh day of the date thereof, then the chargor will have defaulted in the payment in terms of s 148(1) of the Code and the bank will have been justified to issue the requisite notice in writing under that section. In the premises, I hold that the plaintiff had not established that the defendants had defaulted in the principal sum, interest and other moneys secured by exh CHK1. Without such notice of demand under cl 1 shown to the court, exh CHK3 is purportedly issued.

At this juncture, we must point out that the question whether proper demand was made or not was not canvassed before his Lordship nor before us, although it was raised in the affidavit of the first defendant and, since the learned judge had made a decision on this, it would be proper for us to address ourselves on this issue.

Under s 148(1), it is the default and not the demand for the payment under cl 1 of the charge that triggers off the right of the plaintiff to issue the notice in writing. Such notice is not intended for the purpose of demanding payment of the amount due to the plaintiff but to notify the chargor that the plaintiff would resort to s 148(2)(c) for an order for the sale of the charged land unless such default is remedied. Only, and only if, the chargor fails to comply with the requirements of the notice, the plaintiff has the liberty to apply to the High Court for such order. Subsections (1) and (2) of s 148 read:

(1) If default be made in the payment of the principal sum, interest or other moneys secured by a charge, or in the observance of any agreement, expressed or implied in any charge, the chargee may give to the chargor, his personal representatives or assigns notice in writing that the chargee will resort to all available remedies unless such default be remedied.

(2) If the chargor fails to comply with the requirements of any notice lawfully given, the chargee shall be at liberty to apply to the High Court—

...

(c) for the sale of the charged land,

and the court after hearing the evidence may make such order as in the circumstances seems just.

Clearly, the steps to be taken by the plaintiff could briefly be stated thus:

(1) the chargee must make a demand under the charge for the payment of the amount due to him;

(2) only where the chargor fails to make payment after having been served with the notice of demand under cl 1 of the charge that notice under s 148(1) may be issued; and

(3) where the chargee fails to comply with the requirements of the notice, then the chargee's statutory right to apply for an order of sale of the charged land is activated.

It follows, therefore, that the demand under cl 1 of the charge is not a condition precedent to an action under s 148. On the contrary, it is the default on the part of the defendants to make the payment on demand that constitutes a condition precedent to an application under s 148(2)(c).

Coming back to the first issue as agreed by the parties, it is also clear from the passage of the judgment adverted to above that the determination of this issue revolves around the proper construction of s 148(3), including its proviso. It was also obvious that the learned judge, having agreed with the counsel for the defendants' contention, was of the view that in order to arrive at the correct construction of the section, resort to the legislative history of s 148(3) as aid to construction was necessary. Thus, the court engaged itself in the construction of s 148(3) with the discussion of ss 60 and 61 of the repealed Land Ordinance (Cap 27), and s 45 of the repealed Land Settlement Ordinance (Cap 28) as well as s 138(i)(a) of FMS Cap 138 where the period of notice of not less than 30 days was provided.

It would appear to us that two relevant questions ensue from the decision on this point. Firstly, can the court in construing the provisions of an Act allow the proviso to the section to exercise an undue influence on the construction of the main section, and secondly, whether the court is justified to resort to legislative history of the provision of a section as an aid to its construction where the words in the section are clear and unambiguous? The learned counsel for the defendants in the High Court apparently succeeded to persuade his Lordship to agree with his contention that both questions should be decided in his favour although, on the authorities, such contention could not be sustained.

With respect, we do not agree with the method of construction employed by counsel for the defendants and agreed to by the learned judge. In respect of the first question, the matter has been settled and dealt with adequately by Lord Watson in *The Guardians Of The Poor Of The West Derby Union v The Metropolitan Life Assurance Society & Ors.*[3] At p 652 his Lordship said:

> ... but I am perfectly clear that if the language of the enacting part of the statute does not contain the provisions which are said to occur in it, you cannot derive these provisions by implication from a proviso. When one regards the natural history and object of provisos, and the manner in which they find their way into Acts of Parliament, I think your Lordships would be adopting a very dangerous and certainly unusual course if you were to import legislation from a proviso wholesale into the body of the statute, although I perfectly admit that there may be and are many cases in which the terms of an intelligible proviso may throw considerable light upon the ambiguous import of statutory words. I therefore concur in the judgment which has been moved.

According to *Craies on Statute Law* (7th Ed) the effect of an excepting or qualifying proviso, according to the ordinary rules of construction, is to except out of the preceding portion of the enactment, or to qualify something enacted therein, which, but for the proviso, would be within it; and such a proviso cannot be construed as enlarging the scope of an enactment when it can be fairly and properly construed without attributing to it that effect.

Lord MacMillan had occasion to address the Privy Council on the role of the proviso in a section in the case of *Corporation of the City of Toronto v A-G for Canada*.[4] At p 37 he had this to say:

> The purpose of the enactment is to give to the provincial treasurers the fines imposed in their provinces other than those which are expressly appropriated to the dominion minister of finance. But for the proviso fines imposed in the province of Ontario, with the stated exceptions, would have been payable to the treasurer of the province — not all fines, be it observed, but all fines other than those expressly excepted. The proviso qualifies the generality of the main enactment by providing that in the special case of the province of Ontario those fines, but only those fines, which would otherwise have gone to the provincial treasurer shall go to the municipal or local authority which bears the expense of administering justice. It would be foreign to the proper function of a proviso to read this proviso as providing that in Ontario not only those fines which the main enactment gives to provincial treasurers should go to the municipal or local authority but also those fines which the main enactment has expressly said shall not be given to provincial treasurers ...

It seems obvious in the instant case, that the High Court allowed the proviso to play the prominent role in the process of construing s 148(3) and thus control the construction of the main sub-s (3) in the face of the authorities cited above. Unfortunately, these cases were not cited in the High Court although 44 *Halsbury's Laws of England* (4th Ed) paras 857, 863, 864 and 881 were cited before us. Perhaps the learned judge would have arrived at a contrary decision had the authorities been placed before him for his consideration.

On the resort to legislative history as an aid to construction of a statutory provision, Lord Diplock in *Hadmor Productions Ltd & Ors v Hamilton & Anor*[5] at p 229, said:

> My Lords, I think that the meaning of the words in s 13(1) and (2) in their application to the facts in the instant case is too plain and unambiguous to justify resort to legislative history;

Similarly, Lord Russell CJ in *R v Titterton*[6] at p 67 observed:

> The duty of the court when called upon to construe an Act of Parliament is, I conceive, to read the Act itself, and if its language is clear to give effect to what the legislature has said. It is to my mind proper to refer to earlier Acts in pari materia only where there is ambiguity ...

Lord Reid also said something to that effect in *Beswick v Beswick*[7] at p 73 when he said:

> In construing any Act of Parliament we are seeking the intention of Parliament and it is quite true that we must deduce that intention from the words of the Act. If the words of the Act are only capable of one meaning we must give them that meaning no matter how they got there. But if they are capable of having more than one meaning we are, in my view, well entitled to see how they got there ...

As the language of s 148(3) of the Code is clear and unambiguous, we see no reason why resort to legislative history of the section was justified because to do so would alter completely the intention of the legislature when it introduced s 148(3).

In order to appreciate the purport of s 148(3) in this judgment, it is reproduced:

> The notice under subsection (1) shall comply with the terms of the charge:
>
> Provided that, without prejudice to subsection (4) of section 145, if no period of notice for the purposes of this section is stipulated by the charge, not less than thirty days' notice shall be given.

Obviously, one has to look at the terms of the charge to ascertain and determine the period of the notice since sub-s (3) provides that the notice shall comply with the terms of the charge. The relevant terms of the charge relating to notice is to be found in cl 2(1) already referred to above. The period of the notice was categorically and unequivocally stipulated to be 14 days, and, in the light of the clear provisions of sub-s (3) which was complied with in the instant case, such a notice could not but be valid, and by no stretch of the imagination or other reasonable process of interpretation could the section be interpreted to require the minimum period of 30 days. We do not perceive any reasons why, under the circumstances, it was incumbent upon the High Court to seek the aid of the proviso or the legislative history of the section to arrive at the correct construction of the subsection. Clearly, there is no ambiguity in the wording of s 148(3) to justify any resort to aid to construction of the subsection. The proviso, being intended to operate or have the effect of excepting the main provision only where no period of the notice was stipulated in the charge, did not, therefore, apply in the instant case. In the result, the notice, in our view, was valid and effective for the purpose of sub-s (2)(c). Any other construction to the provision of s 148(3) would do violence to the clear and unambiguous language employed in the subsection and render it meaningless.

The other two issues were not argued before us and neither were they dealt with by the High Court. In any case, the issues are not worthy of any consideration since, in fact, the first and second issues seem to be a contradiction in terms and the third issue was answered by the first defendant in his own affidavit where he averred that he and the second defendant were the shareholders, and that he himself was the general manager of the customer. Surely, service on him would be sufficient service on the customer.

We would for these reasons allow the appeal with costs here and below. The deposit is to be refunded to the appellant.

Appeal allowed.

Reported by Prof Ahmad Ibrahim